APPEAL NO. 93103

On December 1, 1992, a contested case hearing was held in Bryan, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent/cross-appellant (claimant herein) sustained an injury to his hip and back on (date of injury) during the course and scope of his employment with the (City) (carrier herein), and that the claimant had not shown that he had disability after October 17, 1991. The carrier contends that the hearing officer erred in permitting a witness to testify about the claimant's disability and requests that we reverse the hearing officer's conclusion that the claimant sustained an injury in the course and scope of his employment on (date of injury). The claimant filed a timely response requesting that the hearing officer's decision be upheld. The claimant then filed an untimely request for review of the hearing officer's determination that he did not have disability after October 17, 1991.

DECISION

The decision of the hearing officer is affirmed.

The carrier's request for review and the claimant's response were timely filed. However, the claimant's request for review was not timely filed, therefore, claimant's request for review will not be considered on appeal. Article 8308-6.41(a) provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings. The hearing officer explained the appeals procedure and time limit for appeal at the hearing. The hearing officer's decision was mailed to the parties on January 26, 1993. The claimant does not state when he received the decision of the hearing officer. Accordingly, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the decision on January 31, 1993, which was the date five days after the date the decision was mailed. Under Rule 143.3(c), a request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and is received by the Commission not later than the 20th day after the date of receipt of the decision. The 15th day after the date the claimant is deemed to have received the decision was February 15, 1993, which day was a national holiday (Washington's birthday). Thus, under Rule 102.3(a)(3), the time for filing the appeal was extended to the next day, February 16, 1993. The envelope containing the claimant's request for review is postmarked February 22, 1993, and the request was received by the Commission on February 23, 1993. Thus, the claimant's request for review was not mailed to the Commission by February 16, 1993, and was therefore, not timely filed.

The hearing concerned the claimant's claim that he was injured at work on (date of injury). The claimant testified that he sustained a lumbar sprain/strain at work on June 14, 1991, received temporary income benefits for about four weeks during June and July, and was released to return to light duty work by Dr. R sometime prior to (date of injury). The claimant said that after he was released to return to work he had no symptoms, pain, aches,

stiffness, and was not hurting. The claimant further testified that when he lifted a garbage can to load into a truck at work on (date of injury), he felt pain in the same spot of his lower back and hip as he had had on June 14th, and reported to his supervisor on August 26th that he had been injured at work on that day. In an employer memorandum that was in evidence, the supervisor said that on August 26th the claimant reported to him pain from a previous injury. The employer's workers' compensation claims coordinator testified that she was unaware that the claimant was claiming he had been injured on August 26th until she received a notice from the Commission on an unspecified date requesting her to complete an employer's first report of injury. Timely notice of injury was not an issue at the hearing. The claimant said that he stopped working on August 26th and did not return to work until November 1991. He said that Dr. R kept telling him that he could perform regular duty work. The claimant said that he changed treating doctors from Dr. R., to Dr. S S, after his (date of injury) injury.

In an Initial Medical Report dated September 10, 1991, which stated "original injury 06-14-91" and "re-injury 08-26-91," Dr. S reported that the claimant told him that the injury occurred when he was picking up trash and felt pain in the low back and hip. Dr. S diagnosed the claimant as having lumbar disc syndrome, lumbar sprain/strain Grade III, radicular neuralgia, and cervical sprain/strain Grade III. Concerning the cervical sprain/strain, the claimant testified that sometime between his injury of June 14th and his injury of August 26th he had sustained a neck injury at work while operating a boom on a brush truck.

The carrier requests that we reverse the hearing officer's conclusion that on (date of injury), the claimant sustained an injury to his hip and back during the course and scope of his employment with his employer. In his decision, the hearing officer indicated that on (date of injury), the claimant aggravated his injury of June 14th. The claimant has the burden of proving that an injury was received in the course and scope of his employment. Spillers v. City of Houston, 777 S.W.2d 181 (Tex. App.-Houston [1st Dist.] 1989, writ denied). It is well settled that the mere existence of a preexisting injury or disease which aggravates or enhances a complained of injury does not defeat a claimant's right to recover workers' compensation benefits. Gonzalez v. Texas Employers Insurance Association, 772 S.W.2d 145 (Tex. App.-Corpus Christi 1989, writ dism'd). An injury that aggravates a preexisting bodily infirmity is compensable provided an accident arising out of employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ). Pursuant to Article 8308-6.34(e), the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. The claimant is an interested witness and his testimony does no more than raise a fact issue for the hearing officer. Nevertheless, the hearing officer had a right to believe the claimant's testimony, and believing it, had a right to find that he was injured on (date of injury), while working for his employer. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). We do not substitute our

judgment for that of the hearing officer where, as here, there is sufficient evidence to support the hearing officer's conclusion and the conclusion is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The carrier contends that the hearing officer erred in allowing the testimony of "Mr." Richard Stephenson because he was not a licensed chiropractor and did not examine the claimant. The carrier did not object to the testimony of this witness at the hearing. This witness testified that he was an "associate chiropractor," that he worked with Dr. S, that he had taken the test to be licensed to practice chiropractic and had "graduated," that he was waiting for his license to practice, and that he had not examined the claimant but had reviewed the claimant's medical records. He testified concerning the claimant's injury of (date of injury) and the claimant's disability. The carrier cites TEX. R. EVID. 702 concerning testimony of experts in support of its contention.

Pursuant to Rule 142.2(8), the hearing officer rules on the admissibility of evidence. The carrier made no objection to the testimony of Mr. S at the hearing. Evidence which is admitted without objection can not be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). Consequently, in the absence of an objection at hearing, we find no merit in the carrier's contention on appeal concerning the admissibility of the complained of testimony. Although we have overruled the carrier's contention on the basis of its failure to object to the testimony at the hearing, we wish to make several observations concerning its contention. First, the hearing officer is not required to conform to the legal rules of evidence. Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. Second, generally, the issues of injury and disability in a workers' compensation case may be established by testimony of the claimant and other lay witnesses. Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ); Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991. Third, the claimant included with his response a copy of the witness' license from the Texas Board of Chiropractic Examiners dated November 20, 1992; hence the witness was a licensed chiropractor when he testified at the hearing on December 1, 1992. Fourth, the witness did not testify concerning maximum medical improvement (MMI) or impairment rating. *See* Texas Workers' Compensation Commission Appeal No. 93095, decided March 19, 1993, which concerns the necessity for an examination for findings of MMI and impairment rating.

Without objection by the parties, the hearing officer took official notice of the Commission's claim files for the claimant's June 14 and (date of injury) injuries. Since the hearing officer took official notice of those files, they have been reviewed on appeal. Hearing officers should not take official notice of entire claim files. We recommend that the

hearing officer make hearing officer exhibits of relevant documents which are in the claim file and which the hearing officer wishes to consider in resolving the case, instead of taking official notice of such documents. In this way, the parties and the Appeals Panel can more readily discern which documents were considered by the hearing officer and such documents are more likely to be transmitted to the Appeals Panel when a case is appealed (without an additional request for the documents) than if the documents are officially noticed.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge